No. 83-887

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JUNIOR S. JACKSON,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ALVIN E. DOMASH
HUGH C. GRIFFIN *
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

WILLIAM E. HOLLAND
39 South LaSalle Street
Suite 1521
Chicago, Illinois 60603

Attorneys for Respondent,
CONSOLIDATED RAIL CORPORATION

Of Counsel:
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

* Attorney of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0250

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Respondent, Consolidated Rail Corporation ("Conrail"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case reported at 717 F.2d 1045 (7th Cir. 1983).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner seeks review of a Seventh Circuit Court of Appeals decision that is not in conflict with any decision of any other Court of Appeals or with any State court

of last resort and does not depart from any accepted or usual course of judicial proceedings or sanction such a departure by any lower court (Supreme Court Rule 17). On the contrary, the Court of Appeals' opinion is consistent with:

1) Section 3 of the Railway Labor Act (RLA), 45 U.S.C. §153 First, setting up a uniform system of arbitration and appeal by which any union railroad employee, aggrieved by any employment-related discipline imposed by his employer, may seek review of that discipline order before the National Railroad Adjustment Board.

2) All prior decisions of this Court, e.g., *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), and other federal and state courts recognizing the exclusive and mandatory jurisdiction of the National Railroad Adjustment Board over all employment-related grievance disputes between union railroad employees and their employers including all claims of "wrongful discharge."

3) All decisions of this Court, e.g., *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), and other courts of review recognizing that the Railway Labor Act, through the National Railroad Adjustment Board, is intended to provide a fair tribunal and a uniform method whereby all railroad employees throughout the nation, represented by counsel of their choice, can obtain complete review of and relief from any allegedly improper discipline order.

Furthermore, the basic premise underlying the entire petition, i.e. that the Seventh Circuit Opinion leaves railroad employees without any meaningful remedy against claims of retaliatory or other allegedly wrongful discharge (Petition, pp. 1, 6, 7, 11-12, 15) is without merit and

patently contrary to the express provisions of the Railway Labor Act providing that, upon reversal of any disciplinary action, the Adjustment Board may order the railroad to make any appropriate award including the payment of money to the aggrieved employee. 45 U.S.C. §153 First (m)(o).

ADDITIONAL STATEMENT OF THE CASE

Petitioner was employed by Conrail as a maintenance of way track foreman (T. 173-174), he was a member of the Brotherhood of Maintenance of Way Employees (T. 521), he was covered by his union's collective bargaining agreement (T. 639, Pl. Ex. 16), and he was subject to the disciplinary, grievance and appeal procedures contained therein as well as those provisions of the Railway Labor Act providing for final and binding adjustment of all employee claims and grievances before the Railroad Adjustment Board, 45 U.S.C. Section 153 First (i).

Petitioner attempts to mislead the Court with his repeated assertion that Conrail "admitted" and "conceded" that petitioner was discharged in retaliation for filing his questionable* FELA action (Petition, pp. 8, 9, 13).

* The basic theory of plaintiff's FELA claim changed even after the trial had begun. In his pleadings prior to trial and after trial commenced, plaintiff contended that Conrail had violated the FELA by requiring him to lift 80 pound salt bags at the Wabash yards on February 3, 1978 (R. 1, 45, 57) and that this lifting activity aggravated a pre-existing ulcer condition (R. 152-153). At trial, after his medical expert testified that neither lifting salt bags nor any other physical exertion would aggravate an ulcer condi-

(Footnote continued on following page)

In truth, Conrail vehemently denied petitioner's contention that he was discharged in retaliation for filing his FELA suit and introduced abundant evidence to the contrary as follows:

Institution Of Disciplinary Proceedings

As required by petitioner's union's collective bargaining agreement (Pl. Ex. 16), the disciplinary proceedings which led to petitioner's discharge on April 20, 1981 were commenced by a letter from Conrail dated February 3, 1981 (Pl. Ex. 2) advising plaintiff of a formal hearing to be held at Fort Wayne, Indiana. This letter also set forth the specific Railroad Safety Rule violations with which he was charged.

Hearing

A hearing on the charges against petitioner was held on February 25, 1981 (Tr. 282). Petitioner did not attend the hearing although he was aware of the time and place of the hearing and he was physically able to attend (Tr. 283-284). He claimed that he did not go and that he asked for a continuance because he was unable to talk to his union representative (who was present at the hearing) (Tr. 283-284) and because his witnesses (never identified at the time of the hearing or at trial) were on vacation (Tr. 273-274). He admitted that the company clerk had called him on the morning of February 25, 1981 and advised him

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* *continued*

tion (Tr. 577-578), plaintiff changed his theory and filed a Third Amended Complaint, omitting any reference to salt bags, and contending instead that his injuries were a result of long work hours during a winter blizzard (R. 101, Tr. 691).

that the hearing was going ahead as scheduled (Tr. 283). The clerk testified that petitioner told her that he was still not coming, that they should go ahead without him, and that he would "just let the chips fall where they may" (Tr. 356).

The hearing officer was Mr. R.D. Decker, Assistant Division Engineer (Tr. 352, 433). Petitioner's union representative, Mr. L.A. Felice, was present (Pl. Ex. 4). Also present was Mr. R.W. Meyers, Conrail's supervisor of track production; Mrs. Bodine, the chief clerk; and a stenographer (Pl. Ex. 4). After the hearing was completed, the transcript of the hearing was forwarded to the Division Engineer, Mr. W. L. Hammonds, for his decision on the discipline to be administered (Tr. 358, 612).

Notice Of Discipline And Discharge

Mr. Hammonds had reviewed 200 to 300 disciplinary cases (Tr. 601). After reviewing the transcript of the February 25, 1981 hearing and petitioner's prior disciplinary record, Hammonds, on April 20, 1981, issued a Notice of Discipline discharging petitioner (Tr. 199) (Pl. Ex. 5). The Notice of Discipline cited petitioner's violation of specific Railroad Safety Rules including petitioner's failure to immediately report his February 3, 1978 injury to a railroad supervisor (Pl. Ex. 6) (Tr. 614).

Petitioner admitted that he was fully aware of the injury reporting rule (Tr. 255, 307-308) and there was evidence that the injury reporting rule is considered particularly essential so that the railroad can: 1) ascertain that all necessary medical attention has been obtained; 2) investigate and take all necessary steps to prevent future accidents; and 3) report all accidents to the Federal Railroad Administration as required by law (T. 614-615). See 49 C.F.R. Section 225.5.

The Division Engineer, Mr. Hammonds, further testified that his decision to order dismissal in this case was based, not only on the rule violations set forth in the Notice of Dismissal, but also upon petitioner's prior disciplinary history which was as follows:

1) Petitioner had been disciplined for failure to obey a supervisor's orders in 1977 (Tr. 590, 516-517) and was demoted from track foreman to trackman. However, petitioner took an intra-company appeal as provided by his collective bargaining agreement and was ordered re-instated to his former position as foreman (Tr. 209).

2) Petitioner was also disciplined in 1979 as a result of a derailment (Tr. 209, 592). As foreman of the work, he had not complied with certain engineering standards as to ballast and railroad ties in the area of the derailment (Tr. 592). Petitioner also took an appeal from that discipline order which was still pending at the time of his discharge (Tr. 210).

3) Petitioner had also received a 30-day suspension for his failure to report another injury which was not involved in this case but which was the basis of another pending suit (Tr. 211).

Appeal Process Available To Petitioner Under His Collective Bargaining Agreement And Under The RLA

Mr. Hammonds testified that his discharge notice of April 20, 1981 was not "final" since petitioner was entitled to a three-level appeal above Hammonds (Tr. 595-599). In fact, Hammonds testified that he himself had once reversed a disciplinary action that had been taken against petitioner in another matter (Tr. 590-591).

The intra-company appeal procedures available to petitioner were set forth in Rules 34 and 35 of his union's

collective bargaining agreement (Pl. Ex. 16) (Tr. 639-640). Under these provisions, petitioner had 60 days to file a grievance claim seeking to overturn Hammonds' decision and to obtain reinstatement and back pay. If his grievance claim was disallowed, petitioner had another 60 days to file an appeal to the highest officer of the company designated to hear grievance claim appeals.

If petitioner still did not obtain satisfactory relief from Hammonds' decision, he then had 9 months to institute proceedings before the National Railroad Adjustment Board pursuant to the grievance review and appeal procedures set forth in the Railway Labor Act, 45 U.S.C. Section 153 First.

Petitioner Ignores Appeal Process—Files Suit

In the instant case, petitioner did not pursue any of the above avenues of appeal to which he was entitled under his collective bargaining agreement and under the Railway Labor Act, and as he had done in at least two prior disciplinary proceedings. Instead, less than three weeks after the notice of discipline was issued, petitioner amended the complaint in his pending FELA action to add a count alleging "retaliatory discharge" under Indiana law.

The District Court held that it had jurisdiction over said claim, and the Seventh Circuit, in accordance with the language, purpose and intent of the RLA and the clear holding of this Court in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972), and its progeny, reversed. The FELA award was affirmed, *Jackson v. Conrail*, 717 F.2d 1045 (7th Cir. 1983).

ARGUMENT

I.

THE COURT OF APPEALS ADHERED TO WELL-SETTLED LAW UNDER THE RAILWAY LABOR ACT RECOGNIZING THE EXCLUSIVE JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD IN ALL EMPLOYMENT-RELATED GRIEVANCE DISPUTES BETWEEN UNION RAILROAD EMPLOYEES AND THEIR EMPLOYER.

Railway Labor Act

The law establishing the Railroad Adjustment Board's mandatory and exclusive jurisdiction over plaintiff's retaliatory discharge claim is set forth in Section 3 of the Railway Labor Act, 45 U.S.C. Section 153 First. Some of the more pertinent provisions are as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, *shall be handled in the usual manner up to and including the chief operating officer of the carrier* designated to handle such disputes; but *failing to reach an adjustment in this manner, the disputes may be referred* by petition of the parties or by either party *to the appropriate division of the Adjustment Board* with a full statement of the facts and all supporting data bearing upon the disputes.
>
> * * *
>
> "(j) *Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect,* and the several divisions of the Adjustment Board shall give due notice of all hearings

to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

"(m) *The awards of the several divisions of the Adjustment Board shall be stated in writing.* A copy of the awards shall be furnished to the respective parties to the controversy, and *the awards shall be final and binding* upon both parties to the dispute." (Emphasis added).

In accordance with these provisions, petitioner's collective bargaining agreement specified that any employee aggrieved by any disciplinary decision of the railroad had the right to file a grievance claim and then to appeal that claim to the highest designated officer within the company (Pl. Ex. 16). If the desired relief still was not obtained, petitioner then had 9 additional months to file a claim with the Railroad Adjustment Board* in accordance with the provisions of the Railway Labor Act. (Pl. Ex. 16)

Holding Of This Court In *Andrews*

The mandatory and exclusive jurisdiction of the National Railroad Adjustment Board to review and finally resolve

* Membership on the Adjustment Board is equally divided between representatives selected by the carriers and representatives selected by the labor organizations of the employees, 45 U.S.C. Section 153 First (a). The Board is comprised of various divisions to hear and finally determine employment disputes. The third division, which is comprised of ten members, five of whom are selected by the union and five of whom are selected by the carrier, hears all disputes involving maintenance of the way men such as petitioner, 45 U.S.C. Section 153 First (h). Provision is also made for system, group or regional boards to be established by voluntary agreement between the carriers and the unions, 45 U.S.C. Section 153 Second. If the members of the Board are deadlocked or evenly divided, a neutral "referee" is then chosen to cast the deciding vote, 45 U.S.C. Section 153 First (e).

all "wrongful discharge" and other employment grievances of railroad employees was unequivocally confirmed by this Court in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972). In *Andrews*, plaintiff urged that defendant railroad had wrongfully refused to allow him to return to work following an automobile accident. He filed suit for "wrongful discharge", seeking damages for past and future wage loss. The District Court and the Court of Appeals dismissed the action on the ground that plaintiff's sole remedy was under the Railway Labor Act and that the method of review provided under the Act, including appeal to the National Railroad Adjustment Board, was exclusive and mandatory.

In an almost unanimous opinion (7 to 1), this Court affirmed and held:

> a) that the Railway Labor Act mandates compulsory arbitration of employee grievance disputes before the Railroad Adjustment Board which has exclusive jurisdiction under the Act to review and resolve all so-called "minor disputes" between railroad employees and their employers; and
>
> b) that all individual grievance matters of railroad employees covered by an existing collective bargaining agreement, including all discharge grievances whether characterized as "wrongful" or otherwise, are "minor disputes" subject to the exclusive jurisdiction of the Adjustment Board and the mandatory grievance review provisions of the Act, while a so-called major dispute exists only "when there is disagreement in the actual bargaining process for a new contract" (406 U.S. at 322).

In the language of the *Andrews* Court (406 U.S. at 322):

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; *the Act compels*

the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. Quoting *Walker v. Southern R.Co.*, 385 U.S. 196, 198 (1966). (406 U.S. at 322) (Emphasis added.)

* * *

"[The] record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as *compulsory arbitration* in this limited field." (406 U.S. at 322 quoting from *Trainmen v. Chicago R.&I.R. Co.*, 353 U.S. 30, 33 (1957)) (Emphasis added.)

"Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, *was never good history and is no longer good law.*" (406 U.S. at 322.) (Emphasis added.)

* * *

"The fact that petitioner characterizes his claim as one for 'wrongful discharge' does not save it from the Act's mandatory provisions for the processing of grievances. *** The fact that petitioner intends to hereafter seek employment elsewhere does not make his present claim against his employer any the less a dispute as to the interpretation of a collective bargaining agreement. *His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.*" 406 U.S. at 323-324. (Emphasis added.)

In *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), this Court reiterated the holding and rationale of *Andrews* and further expounded on the exclusive and mandatory jurisdiction of the Railroad Adjustment Board as follows:

> "In enacting this legislation, Congress endeavored *to promote stability in labor management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes* arising out of the interpretation of collective bargaining agreements . . . *The Adjustment Board was created as a tribunal* consisting of workers and management *to secure* the prompt, orderly and *final settlement* of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions . . . *Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts* . . . The effectiveness of the Adjustment Board in fulfilling its task depends on the *finality* of its determinations." *Sheehan*, 439 U.S. at 94. (Emphasis added.)

Numerous cases following *Andrews* and *Sheehan* have unanimously concluded that the federal district courts lack subject matter jurisdiction over suits alleging wrongful discharge or other purported state law tort actions which arise from or are related to employment grievances governed by the Railway Labor Act. See e.g. *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), (no jurisdiction over purported state law tort action for "infliction of emotional distress" allegedly suffered by reason of discharge), *cert. den.* 439 U.S. 930; *Carson v. Southern Railway Co.*, 494 F.Supp. 1104 (D.S. Car. 1979) (no jurisdiction over purported state law tort action for "defamation" arising out of accusations made during discharge proceedings); *De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29 (1st Cir. 1978) (no jurisdiction over purported action for malicious deprivation of benefits); *Pandil v. Illinois Central Gulf R. Co.*, 312 N.W. 2d 139 (Ia. 1981) (no jurisdiction over alleged wrongful deprivation of retirement benefits), *cert.*

den. 456 U.S. 975; *Majors v. U.S. Air Inc.*, 525 F.Supp. 853 (D. Md. 1981) (no jurisdiction over purported state law tort action for "false imprisonment" arising from theft accusations by employer).

The Instant Case Is Plainly Covered By The *Andrews* Holding And The Exclusive Remedy Provisions Of The Railway Labor Act

In the instant case, petitioner claimed that his discharge was not based upon his violation of the Railroad Safety Rules or upon his prior disciplinary record, but was in retaliation for his filing of an FELA suit. As set forth in *Andrews* and its progeny *supra*, this is exactly the type of an employee grievance dispute and wrongful discharge type claim falling within the exclusive jurisdiction of the Railroad Adjustment Board under the Railway Labor Act. In the language of the Court of Appeals:

> "There is no question that Jackson's right not to be discharged at the will of Conrail grows out of the collective bargaining agreement. Similarly, there is no doubt that a retaliatory discharge is one variety of a 'wrongful discharge' claim." (717 F.2d at 1049).*

Petitioner had every right to take his "retaliation" claim to the Board if the intra-company grievance and appeal procedures afforded him by his collective bargaining agreement did not bring reinstatement, back pay, or any other monetary relief desired. Petitioner was well aware of these procedures and had pursued them successfully in

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* Other cases have also used the terms "wrongful discharge" and "retaliatory discharge" interchangeably e.g. *Parner v. Americana Hotels, Inc.*, 652 P.2d 625 (Hawaii 1982); *Sventko v. Kroger Co.*, 245 N.W.2d 151 (Mich. App. 1976); *Cook v. Caterpillar Tractor Co.*, 407 N.E.2d 95 (Ill. App. 1980).

at least one prior grievance dispute. His decision here to forego these contractual and statutory remedies available to him, and instead to amend his FELA complaint to allege a state law tort action for retaliatory discharge,* did not enable him to avoid the exclusive remedy provisions of the Railway Labor Act or the exclusive and mandatory jurisdiction of the Railroad Adjustment Board, and the Seventh Circuit properly so held.

None Of The Cases Cited In The Petition Are Applicable To The Facts At Bar

The cases cited by petitioner fall into one or both of the following categories:

1) *Cases involving separate and independent "federal rights of action": Hendley v. Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980) (action under Section 60 of the FELA imposing penalties on anyone who attempts to prevent employees from voluntarily providing information to plaintiffs in FELA cases); *Johnson v. American Airlines, Inc.*, 487 F. Supp. 1343 (N.D. Tex. 1980) (action under Section 3 of the Age Discrimination In Employment Act); *Zipes v. Trans World Airlines, Inc.*,

* Under these facts, it is highly doubtful that petitioner even had a cause of action under state law. The case on which he relies, *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973), involved a terminable at-will employee with no other remedy or means of recourse for wrongful discharge. Subsequent cases recognizing *Frampton* have refused to extend its holding to employees, such as petitioner, who were working under a collective bargaining agreement, who were not terminable at-will, and who had the right of appeal from any discharge order. See *Cook v. Caterpillar Tractor Co.*, 407 N.E.2d 95 (Ill. App. 1980), *Suddereth v. Caterpillar Tractor Co.*, 449 N.E.2d 203 (Ill. App. 1983). Contra, *Wyatt v. Jewel Companies, Inc.*, 439 N.E.2d 1053 (Ill. App. 1982).

455 U.S. 385 (1982) (action under Title VII of the Civil Rights Act); *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963) (suit under State Anti-Discrimination Act to enforce federally protected equal protection and due process rights to protect against racial discrimination in hiring).

None of these decisions has applicability to the case at bar. No provision of the FELA gives any right of action for retaliatory discharge, *Bay v. Western Pacific Railroad Co.*, 595 F.2d 514 (9th Cir. 1979), and thus petitioner candidly conceded in his Court of Appeals' brief that "plaintiff Jackson did not allege a cause of action [for] violation of federal statute in his retaliatory discharge claim" but instead relied solely on an alleged "violation of Indiana law" (Appellee's Br. 29).

2) *Cases not involving the Railway Labor Act and the exclusive and mandatory jurisdiction of the National Railroad Adjustment Board: Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) (store owner obtained state court injunction against trespassing union picketers); *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977) (union officer brought tort action against his union for conduct unrelated to actual employment discrimination); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (action under Section 6 of the Fair Labor Standards Act) and *Curtis v. Loether*, 415 U.S. 189 (1974) (action for violation of fair housing provisions of Title VIII of the Civil Rights Act) involved both a nonrailroad employee and a separate federal right of action. Petitioner also cites *Urie v. Thompson*, 337 U.S. 163 (1949), but the only issue before the *Urie* court was whether the FELA and the Boiler Inspection Act include

injuries in the nature of an occupational disease, such as silicosis.

Clearly none of these cases change, modify or even apply to the mandatory and exclusive jurisdictional provisions of the Railway Labor Act as those provisions were interpreted by the United States Supreme Court in *Andrews, supra* (406 U.S. at 322-325). As expressly noted by the Court of Appeals, there is a significant "difference" between the impact of the NLRA (National Labor Relations Act) and the RLA since "the RLA has made *any* grievance arising out of the collective bargaining agreement subject to the exclusive arbitral remedy contained in the Act" (emphasis in original) (717 F.2d at 1052) and "it is abundantly clear that resolution of [petitioner's] suit impinges on those areas left, under the RLA, to exclusive administrative resolution" (717 F.2d at 1054).

There Is No Need For This Court's Review

In sum, the principles determinative of the issue in this case have already been exhaustively reviewed and resolved by this Court in the *Andrews* and *Sheehan* opinions and uniformly interpreted by numerous lower courts of review. If this or any other purported wrongful discharge case were to be carved out of the statutory framework, there would be no logical or just stopping point, the acknowledged goal of stability and uniformity in the handling of employee disputes throughout the transportation industry would become impossible as the availability of a remedy would depend in each case on the vagaries of every individual state's tort law,* the exclusive and man-

* At least 30 states do not recognize any cause of action for "retaliatory discharge."

datory jurisdiction of the Railroad Adjustment Board would be undermined, and the federal court system would be clogged with all manner of railroad and other transportation employee grievance claims that Congress intended to be kept "out of the courts," *Union Pacific Railroad Co. v. Sheehan, supra*, 439 U.S. at 94.

The Seventh Circuit Court of Appeals correctly ruled that such a result would frustrate the legislative purpose of the Railway Labor Act and directly contradict the prior holdings of this Court and other courts of review that have interpreted the Act. There is no need for this Court to hold again what it has clearly and consistently held before.

II.

THE SEVENTH CIRCUIT PROPERLY REJECTED PETITIONER'S SEVENTH AMENDMENT ARGUMENT.

The Seventh Circuit correctly noted that petitioner's argument urging a Seventh Amendment right to a jury trial "requires only cursory consideration" (717 F.2d at 1049 fn.6). The Seventh Amendment's inapplicability to administrative adjudicatory proceedings was plainly enunciated by this Court in the very decision cited and relied upon by petitioner, *Curtis v. Loether*, 415 U.S. 189 (1974) (Petition, p. 22). The Civil Rights Act at issue in *Curtis* did not involve any administrative review proceeding, but rather an explicit statutory grant under 42 U.S.C. 3612 permitting the filing of civil damage actions in the district court. The distinction was stated in *Curtis* as follows (415 U.S. at 195):

> "[The] cases uphold congressional power to entrust enforcement of statutory rights to an *administrative*

process or specialized court of equity *free from the strictures of the Seventh Amendment.*" (Emphasis added)

This well-settled exception for statutory administrative process, ignored by petitioner in his carefully edited quote from the *Curtis* Opinion, has been uniformly recognized in the unanimous Circuit Court cases holding that the Seventh Amendment is inapplicable to proceedings under the RLA, and there is no point deserving of this Court's review. *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co.*, 370 F.2d 833, 836 (10th Cir. 1966), *cert. denied*, 386 U.S. 1016; *Essary v. Chicago & N.W. Transp. Co.*, 618 F.2d 13, 17 (7th Cir. 1980); *Magnuson v. Burlington-Northern, Inc.*, 413 F.Supp. 870, 873 (D. Mont.), *aff'd* 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 930.

III.

THE SEVENTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT'S LACK OF SUBJECT MATTER JURISDICTION OVER THE RETALIATORY DISCHARGE CLAIM WAS NOT WAIVED.

It is difficult to conceive of any better-established rule in the federal judicial system than the fundamental principle that federal courts are tribunals of limited jurisdiction, 13 Wright & Miller, *Federal Practice & Procedure* §3522 and cases cited therein, e.g. *Victory Carriers, Inc. v. Law*, 404 U.S. 202.

It is equally fundamental that a federal court's lack of subject matter jurisdiction cannot be waived and may be raised at any time in the proceedings, even on appeal. *American Fire & Casualty Co. v. Finn*, 341 U.S. at 6, 17-18 (1951) (holding that lack of subject matter jurisdiction was properly raised even by a party who originally

invoked the federal court's jurisdiction in the first instance). The Circuit Courts have unanimously applied the same rule, e.g. *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980); *Correa v. Clayton*, 563 F.2d 396 (9th Cir. 1977). The case cited by petitioner, *DiFrischa v. New York Central R.R. Co.*, 277 F.2d 141 (3d Cir. 1960), is not to the contrary. There it was simply held that a party would not be permitted to withdraw its stipulation of jurisdictional facts upon which a finding of diversity jurisdiction was then based.

CONCLUSION

For the reasons stated herein, the writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

ALVIN E. DOMASH
HUGH C. GRIFFIN *
115 South LaSalle Street
Chicago, Illinois 60603
(312) 443-0342

WILLIAM E. HOLLAND
39 South LaSalle Street
Suite 1521
Chicago, Illinois 60603

Attorneys for Respondent,
CONSOLIDATED RAIL CORPORATION

Of Counsel:
LORD, BISSELL & BROOK
115 South LaSalle Street
Chicago, Illinois 60603

* Attorney of Record